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REFERENCE TO COMMISSIONER IN CHANCERY.

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(Continued from December Number.)

§§ 37-50. OBJECTIONS AND EXCEPTIONS TO REPORT.

§ 37. IN GENERAL.—In a proceeding in execution of an order of reference, the commissioner acts as a court and it may be said as a general rule that objections may be made and exceptions taken to his actions in the same manner as if the proceedings were actually in a trial before a court.[1] It may also be said as a general rule that all objections that may be made and exceptions taken in the progress of a trial before a court may be begun by either party in a proceeding before a commissioner in chancery.[2] Advantage may be taken of irregularities in the proceedings before the commissioner or in his report by a motion to set aside, to recommit or for a similar appropriate order.[3]

In Prince *v.* Cutler, 69 Ill. 267, 271, it is said, "It was said in Hurd *v.* Goodrich, 59 Ill. 455, 'Consistently with the convenience of courts of equity in this respect, their mode of procedure requires the party who may desire to have the court revise the rulings of the master as to the admission or rejection of evidence, or the principle upon which an account is stated, to file objections to the master's report before it is returned into court, pointing out the grounds with reasonable certainty; then, if the master still adheres to his rulings and report, and returns it into court, the party objecting may then file his exceptions to the report, corresponding with the objections made before the mas-

1. Cincinnati *v.* Cameron, 33 O. St. 336.

2. Lawson *v.* Vissell, 7 O. St. 130.

3. See De Mott *v.* Benson, 4 Edw. (N. Y.) 297; Pool *v.* Gramling, 88 Ga. 653, 16 S. E. 52.

ter, upon the hearing of which the whole, or such part of the evidence as may be material, will be brought forward and be subject to review by the court.' McClay Admr. *v.* Morris, 4 Gilm. 370; Brockman *v.* Aulger, 12 Ill. 277. 'The exceptions are always to be confined to such objections as were allowed or overruled by the master.' (Referring to Copeland *v.* Crane, 9 Pickering, 73; M. E. Church *v.* Jaques, 3 Johns. Ch. 81; Byington *v.* Wood, 1 Paige, 45). There are, nevertheless, exceptions to this rule. Where, owing to accident or surprise, the objections are not taken before the master, the court will allow exceptions to be filed. 2 Daniell's Ch. Prac. 134."

§ 38. NECESSITY FOR EXCEPTIONS—*Errors Appearing on Face of Report.*—As to errors apparent on its face, a commissioner's report may be objected to at the hearing in the trial court, although no exceptions have been previously filed thereto;[4] and, such errors may be objected to in the appellate court, although no exception appears to have been taken in the trial court.[5]

The test of whether an error is apparent on the face of the report may be stated to be whether such error appears without reference to extraneous matter, such as an error of computation.[6] But it has been held in West Virginia that, though it appears from the face of the commissioner's report that usurious interest was allowed, yet if no exception was taken, the appellate court will not, for that cause alone, reverse the decision.[7] This is sustained by other decisions.[8]

While the error is not strictly upon its face, a report which does not conform to the order of reference or the pleading in the case,[9] it would seem, should be considered erroneous on its face and need not be excepted to, but the contrary has been held in Virginia as to matter set up in a cross bill. It was held that though a cross bill sets up a special charge against a party, if

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4. See cases cited in 11 Enc. Dig. Va.-W. Va., p. 735.
5. Thompson *v.* Catlett, 24 W. Va. 524, 540.
6. Bogert *v.* Furman, 10 Paige (N. Y.) 496.
7. Hansucker *v.* Walker, 76 Va. 753.
8. Syles *v.* Hatton, 6 Gill & J. (Md.) 122; Smith *v.* Smith, 4 Johns Ch. (N. Y.) 445.
9. McGowan *v.* Bank, 7 Ala. 23.

upon taking the account by a commissioner, this item is not charged, and the plaintiff in the cross bill does not except to the report for the failure to make this charge, it will be considered as abandoned by the plaintiff.[10]

In Southern R. Co. *v.* Glenn, 98 Va. 309, 36 S. E. 395, it is said, "It is further insisted that, inasmuch as the appellants failed to except to the reports of the commissioner which allowed the additional compensation to the trustee, they can not raise the question in this court. If the propriety of the additional compensation allowed depended solely upon the facts before the commissioner, then it would have been necessary, to have excepted to the commissioner's reports in which it was allowed; but the question is, had the court, under any state of facts, authority to allow the trustee greater compensation for executing the trust than that fixed by the terms of the trust? This was a question of law; and the commissioner, in his report, filed in December, 1886, reported that, in his opinion, the court had no such authority. To this report the trustee excepted, and the court sustained his exception, and held that it had such authority, and decreed additional compensation. This question of law having been thus expressly raised and decided by the court, it was not necessary, even if it would have been proper, to have excepted to the subsequent reports of the commissioner on the same ground. Why require the creditors to raise, and the court to pass upon, the question of its authority to allow additional compensation upon the coming in of every settlement of the trustee's accounts in which such allowance was made, when that question had been before distinctly raised and expressly passed upon by the court?"

Errors Not Appearing on Face of Report.—Objections must be made to and exceptions filed before the commissioner as to errors that do not appear on the face of the report.

In Thompson *v.* Catlett, 24 W. Va. 524, 540, it is said, "If such adult parties fail to except to such report, it will be presumed they were satisfied with it, and acquiesced in its correctness, not only so far as it settles the principles of the account,

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10. Penn *v.* Spencer, 17 Gratt. 85.

but also in regard to the sufficiency of the evidence upon which it is founded."

On Recommittal of Report.—Where the report of a commissioner is recommitted and a party desires to object to items and matters, he must except thereto in order to raise an objection in the trial court in the hearing on the subsequent report.[11] While the above rule has been followed by decisions in both Virginia and West Virginia, it is not followed in some other states, where it is held that the exception need not be renewed.[12] It has been held in New Jersey that where an exception to an item in an account stated by a commissioner in chancery is sustained, the account is sent back to the commissioner for modification and he again reports the item as first stated but includes the facts on which modification is made, the item may be corrected without further formal exception.[13]

But as to matters fully adjudicated by the trial court and not entering into the second report, the exceptions need not be reported,[14] and it is irregular to present by the exceptions to the subsequent report the same questions which had been decided by the trial court upon exceptions to the trial report.[15] Where the objection to a commissioner's report raises a question of law only, which is decided by the trial court, it is not necessary to except to subsequent reports of the commissioner, involving the same question, in order to have the ruling on that question reviewed in the appellate court.

As to Evidence in Papers Filed with Report.—Where a commissioner's report is based upon the evidence of papers filed in the cause, and there is no exception to the report, and the papers not being competent evidence of the facts recited in them, the

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11. Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280; Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433; Kee *v.* Kee, 2 Gratt. 116; Morrison *v.* Householder, 79 Va. 632; Shenandoah Val. Nat. Bank *v.* Shirley, 26 W. Va. 563; Carskadon *v.* Minke, 26 W. Va. 729; King *v.* Burdett, 44 W. Va. 561, 29 S. E. 1010.

12. Moore *v.* Randolph, 70 Ala. 575.

13. Bechtold *v.* Lippincott, 54 N. J. Eq. 407, 34 Atl. 1079.

14. Hopkins *v.* Prichard, 51 W. Va. 385, 41 S. E. 347.

15. Clark *v.* Willoughby, 1 Barb. Ch. (N. Y.) 68.

court may disregard the report, and decide the case upon the competent testimony, and against the report.[16]

As to Finding of Facts.—When a commissioner, to whom a case is referred for the purpose, reports the existence of certain facts, and there is no exception thereto, such facts will be accepted as fully established in the further progress of the suit.[17]

Exception to Part of Report.—When a party excepts to portions of a commissioner's report, the portions not excepted to, unless erroneous upon the face of the report, are admitted to be correct not only as regards the principles but as relates to the sufficiency of the evidence on which they are founded.[18]

As to Extraneous Evidence.—When an exception to a commissioner's report is based on legal grounds, founded on the pleading and exhibits alone, such report will be taken as conclusive as to any finding that might be affected by extraneous evidence. In the absence of exceptions on this ground, it will be presumed that such commissioner had before him sufficient extraneous evidence to sustain his finding.[19]

§ 38. TIME OF FILING EXCEPTIONS. § 39. —— BEFORE COMMISSIONER.—As stated above the rule is that objections must be made and exceptions taken in the proceedings before the commissioner. Objections for want of proof of any voucher, on which a commissioner founds an item in his account, must generally be made before the commissioner himself; in which case, if such proof be not supplied, it may be called for at the hearing; but in no other instance, unless for good cause shown, and upon one month's previous notice.[20]

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16. James River, etc., Co. *v.* Littlejohn, 18 Gratt. 53.

17. Righter *v.* Riley, 42 W. Va. 633, 26 S. E. 357.

18. Perkins *v.* Saunders, 2 Hen. & M. 420; Wyatt *v.* Thompson, 10 W. Va. 645; Hyman *v.* Smith, 10 W. Va. 298; Anderson *v.* Nagle, 12 W. Va. 98; McCarty *v.* Chalfant, 14 W. Va. 531; Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184; Ward *v.* Ward, 21 W. Va. 262; Chapman *v.* McMillan, 27 W. Va. 220; Peters *v.* Neville, 26 Gratt. 549.

19. Gay *v.* Lockridge, 43 W. Va. 267, 27 S. E. 306.

20. Read *v.* Winston, 4 Hen. & M. 450.

In Read *v.* Winston, 4 Hen. & Munf. 450, the court said: "This was a motion to dissolve the injunction, in this case, upon the coming in of the account which had been directed, and to which there were exceptions now put in for the first time; and the vouchers which had been exhibited before the commissioners were called for. By the chancellor. This practice (which has been but lately introduced) of calling for the vouchers of a party, and of putting him to the proof of them upon the trial, I perceive will lead to very great inconvenience if suffered to continue; and, therefore, it must be distinctly understood, that it can not be allowed any longer, unless, where the objection, for want of proof of any voucher, is made before the commissioner, and not supplied before he makes out his report. In all such cases, proof of such vouchers, within the rule of court, may be called for upon the trial; but in no other instance, unless for good cause shown, and upon one month's previous notice thereof to the party, or his agent, or attorney in fact."

While Report Remains in Hands of Commissioner.—Any party interested may, without the expense of taking a copy, inspect the report and evidence and file exceptions thereto during the ten days for which the commissioner is required by the Code of West Virginia to retain the report after completion of the same.[21] "The general convenience of such a practice is obvious, often obviating the delay of recommittal, and evidently contemplated by the statute as the general rule; and, for the same reason, the rule in many courts is that no exceptions to the commissioner's report can be made which were not taken before him." [22]

§ 40. —— In Trial Court—*After Confirmation and Decree.* —So long as a cause is retained on the docket, the court may

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21. W. Va. Code, § 4853; Thompson *v.* Catlett, 24 W. Va. 524; Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810; Arnold *v.* Slaughter, 36 W. Va. 589, 15 S. E. 250; Chapman *v.* McMillan, 27 W. Va. 220.

22. Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810, citing Story *v.* Livingston, 13 Pet. 359; McMicken *v.* Perrin, 18 How. 510; Sand. Eq. 633; 1 Fost. Fed. Pr., § 315.

receive exceptions to a commissioner's report, even after its confirmation, if it is clearly shown that, if carried out, the report would work injustice.[23] There is no rule of law or practice which would forbid or prevent a court, so long as it retained a cause under its consideration, from receiving and entertaining an exception to a commissioner's report, even after the same had been confirmed, if it should be clearly shown that the report, if carried out, would be productive of injustice and wrong.[24] Exceptions should be filed before the decree in the cause or the confirmation.[25] Where a commissioner's report made in a cause, had been returned for more than six years, and the cause was then taken up and heard, the argument concluded, and the opinion of the court pronounced, and then the party against whom the opinion was expressed, excepted to the report for want of notice, it was held, that the exceptions should be disregarded.[26]

In Miller *v.* Holcombe, 9 Gratt. 665, it is said, "The first question to be considered in this cause is that arising on the exception taken on behalf of the appellant and others to the report of commissioner Wyatt, for want of legal notice. The report was returned on the 11th of October, 1838; and this exception was not made until the 24th of April, 1845; upwards of six years afterwards, nor until after the cause had come on to be heard at the special term without objection, and been argued by counsel, and the opinion of the court pronounced against the parties so excepting. During this interval, and while the report was lying in the office, Holcombe, who was best acquainted with the various transactions in question, had departed this life. Under these circumstances it would have been proper for the court to disregard the exception"

At Next Term of Court.—The West Virginia Code provides that any party may except to the report at the first term of the

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23. Wooding *v.* Bradley, 76 Va. 614. See also, Daily *v.* Warren 80 Va. 512, 577.

24. Wooding *v.* Bradley, 76 Va. 614; Nelson *v.* Kownslar, 79 Va. 468, 487; Corey *v.* Moore, 86 Va. 721, 736, 11 S. E. 114.

25. Winston *v.* Johnson, 2 Munf. 305.

26. Miller *v.* Holcombe, 9 Gratt. 665.

court next after the term to which it is filed, or by leave of the court at any subsequent term.[27]

Where Hearing of Cause Not Delayed.—The court will receive exceptions to the commissioner's report at any time, provided the hearing of the cause is not thereby delayed.[28]

Continuance for Filing Exceptions.—It has been held that a suit is not to be continued on the ground of exceptions to a commissioner's report, unless they were filed thirty days before the term, and good cause be shown.[29]

On Rehearing.—When a party neglects to avail himself of an opportunity to except to the report of the commissioner, he can not again bring the matter before the court, unless there be a rehearing.[30]

Excuse for Failure to File on Time.—Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reasons for a bill of review, such objections not having been taken, as they ought to have been, before the rendition of the decree.[31]

Waiver of Objection to Time of Filing.—When it does not appear by the record that the appellant made objection in the court below to the filing of exceptions by an appellee to the report of a commissioner or to the consideration of such exceptions by said court upon the ground that such exceptions were not filed within proper time, objection to the filing of such exceptions or the consideration thereof by the appellate court will not be entertained.[32]

In Johnson *v.* Young, 20 W. Va. 614, 656, it is said, "The

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27. W. Va. Code, § 4852; Chapman *v.* McMillan, 27 W. Va. 220; Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810; Thompson *v.* Catlett, 24 W. Va. 524; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746; Arnold *v.* Slaughter, 36 W. Va. 589, 15 S. E. 250; Arbogast *v.* McGraw, 47 W. Va. 263, 34 S. E. 736; Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

28. Johnson *v.* White, 1 Hen. & M. 201.

29. Johnson *v.* White, 1 Hen. & M. 201.

30. Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.

31. Winston *v.* Johnson, 2 Munf. 305.

32. Johnson *v.* Young, 20 W. Va. 614.

appellant's second assignment of error is that 'it was error to entertain the defendant's exceptions to commissioner's report. The exceptions should have been deemed waived, not having been filed until eight years and more after the report had been filed.' It does not appear that the appellant made any objection in the court below to the filing of said exceptions or to the consideration of said exceptions by the court for any cause and for this reason obviously, if for no other, the objection in this court to the filing of said exceptions or the consideration thereof can not now be entertained by this court."

Indorsement by Clerk of Time of Filing.—When exceptions to a report of a commissioner are filed in a cause, ordinarily the clerk should indorse thereon the time when filed, or otherwise something should appear by which the appellate court may be able to identify the exceptions passed upon by the court below. But for the purpose of identifying the exceptions, the appellate court may look into the whole record.[33]

§ 41. —— IN APPELLATE COURT.—The party complaining of a commissioner's report must take advantage of the opportunity offered him to object and take exceptions thereto before the commissioner and in the trial court. He can not raise an objection for the first time in the appellate court. The appellate court will not enter into an investigation of an account taken by direction of a court of chancery, when either no exception to the commissioner's report was taken in the court below, or not taken in such form as to enable this court to decide on the principle of law or equity on which the item excepted to was admitted or rejected.[34] Error, not apparent on the face of a commissioner's report taken in connection with the pleadings, or which might be affected by extraneous evidence, will not be available as error in the supreme court, unless the report has been excepted to on that ground in the court below.[35]

In Arbogast *v.* McGraw, 47 W. Va. 263, 34 S. E. 736, it is

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33. McClaskey *v.* O'Brien, 16 W. Va. 791.

34. Perkins *v.* Saunders, 2 Hen. & M. 420.

35. Welch Lumber Co. *v.* Pageton Lumber Co., 69 W. Va. 282, 71 S. E. 282.

said, "If the appellant has any just exception to such report, he may yet take advantage of it in the circuit court, and until he has done so he can not appeal to this court. He must exhaust his rights without relief therein first."

After two references before commissioners appointed by the county court, to settle an administration account, and one reference to a commissioner of the high court of chancery, no exception, for the want of credits, will be allowed here, which was not made at one of those examinations.[36] But advantage of an error in a commissioner's report, apparent upon the face thereof, or upon the record of the cause, may be taken in the appellate court, though not noted in any exception to the report nor insisted upon in the court below.[37] "Although no exceptions are filed to a commissioner's report, and the report is confirmed, if the decree of confirmation, upon its face, shows material error as to matter of law, prejudicial to the appellant, for such error the decree should be reversed." [38]

Where Exceptions Are Not Specific.—Exceptions to a commissioner's report, which are too general and do not point out the specific items excepted to, or refer the court to the evidence relied on in support thereof, will not be considered on appeal to the supreme court.[39]

As to Fees Charged by Commissioner.—Unless exception be made in the court below to the amount charged by the commissioner for his fees which he duly makes oath to and which are allowed by that court, it is too late to make exception thereto in the appellate court.

In Shipman *v.* Fletcher, 83 Va. 349, 2 S. E. 198, it is said, "In his assignment of errors in the petition for appeal the appellant says: 'The decree is most manifestly erroneous in sustaining, as it did, the extortionate fee of the commissioner of

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36. Jones *v.* Watson, 3 Call 253.

37. Haymond *v.* Murphy, 65 W. Va. 616, 64 S. E. 855.

38. Reitz *v.* Bennett, 6 W. Va. 417; Ruhl *v.* Berry, 47 W. Va. 824, 832, 35 S. E. 896; Haymond *v.* Murphy, 65 W. Va. 616, 64 S. E. 855; Houston Lumber Co. *v.* Wetzel, etc., R. Co., 69 W. Va. 682, 691, 72 S. E. 786.

39. Bartlett *v.* Boyles, 66 W. Va. 327, 66 S. E. 474.

$700, and in refusing even to allow a stay of execution for its collection upon giving bond for such stay, as the statute allows.' The appellant might have excepted to and contested this fee in the court below, but, so far as the record shows, he omitted to do so; and having made affidavit as to the number of hours employed, the commissioner had a right, under the eighth section of chapter 180 of the Code of 1873, to charge at the rate of one dollar per hour employed diligently in the work."

But it would seem that if the amount charged is in excess of the fee allowed by statute and this is apparent on the record, that a question of jurisdiction of the lower court is presented as to which objection may be made at any stage of the proceedings.

§ 42. WHO MAY EXCEPT.—In a suit to administer a fund in equity, one who by petition asserts a judgment lien upon that fund has a right to except to the commissioner's report giving priority to another judgment, and to show that such other judgment is void.[40]

§ 43. GROUNDS OF EXCEPTIONS—§ 44. —— ERRORS OF COMMISSIONER.—Any action or finding of a commissioner to the substantial injury of a party constitutes a ground for an exception to his report.

Errors as to Validity of Debts.—The commissioner's report may always be excepted to on the ground that a valid debt has been reported as invalid or an invalid debt has been reported as valid.[41]

Errors as to Amount of Fees.—Exception may be taken to the amount of fees charged by the commissioner.[42]

Failure to Give Notice to Parties.—An objection may be taken on the ground of want of notice of the time and place of taking an account. [43]

Failure to Consider Evidence.—A party should place his evi-

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40. Crockett *v.* Etter, 105 Va. 679, 54 S. E. 864.
41. Atwood *v.* Shenandoah, etc., R. Co., 85 Va. 966, 9 S. E. 748.
42. Shipman *v.* Fletcher, 83 Va. 349, 2 S. E. 198.
43. Winston *v.* Johnson, 2 Munf. 305.

dence before the commissioner, and if the commissioner fail to consider it, he should except on that account, otherwise the court must adopt his report as the only basis for its decree.[44]

Failure to Report Facts.—An exception is properly filed to a commissioner's report of liens on property where the commissioner fails to report facts appearing of record in the office of the clerk of the court.[45]

Failure to State Itemized Account.—When a commissioner, to whom a cause is referred to settle large and intricate matters of account containing many contested items, returns a report showing only an aggregation of items in accordance with his conclusions, such report may be excepted to for this reason.[46]

§ 45. —— ERRORS OF TRIAL COURT.—Any error of the trial court to the substantial injury of either party affords a ground for an exception to the action of the court. That the court acted upon the commissioner's report too soon is ground for objection before the rendition of the decree.[47] While errors in the details of a decree for an account are not a proper subject for appeal and correction in the appellate court, they may be corrected by exceptions to the commissioner's report.[48]

§ 46. —— DEFENSE OF STATUTE OF LIMITATIONS.—The defense of the statute of limitations to a claim asserted before a commissioner in chancery may be made by an exception to the commissioner's report. The mere fact that, subsequently, the claimant asserts his claim by a petition filed in the cause, upon which no process issues, does not render it necessary to make the issue of the bar of the statute again.[49] Where in a bill by a creditor of the testator against the executor and a legatee, the latter relies upon the statute of limitations in his answer, the

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44. Long *v.* Willis, 50 W. Va. 341, 40 S. E. 340.
45. Jones *v.* Byrne, 94 Va. 751, 27 S. E. 591.
46. Dewing *v.* Hutton, 40 W. Va. 521, 21 S. E. 780.
47. Winston *v.* Johnson, 2 Munf. 305.
48. Rust *v.* Rust, 17 W. Va. 901, citing Humphrey *v.* Foster, 13 Gratt. 653; McCarty *v.* Chalfant, 14 W. Va. 531, 558, 559.
49. Coles *v.* Martin, 99 Va. 223, 37 S. E. 907.

plaintiff having stated in the bill that his debt was evidenced by deed, if it appears in the progress of the cause that it was by parol, the executor may set up the defense of the statute by exception to the commissioner's report.[50]

§ 47. FORM AND REQUISITES OF EXCEPTIONS—§ 48. —— IN GENERAL.—An exception to a commissioner's report must be in writing,[51] bear date[52] and be signed by counsel.[53]

§ 49. —— SPECIFICATION OF ERRORS.—Exceptions to a commissioner's report partake of the nature of a special demurrer, and, in all cases where necessary at all they should specify with reasonable certainty the particular grounds of objection relied on, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide.[54] Exception to a master's report should be so framed as not merely to allege error in general terms, but should be sufficiently definite and explicit to enable the court understandingly to decide on each point

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50. Tazewell *v.* Whittle, 13 Gratt. 329.

51. Form and Requisites.—An exception is "a written enumeration of the alleged errors and of the corrections proposed." Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

52. Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

53. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

54. Crockett *v.* Sexton, 29 Gratt. 46; Robinett *v.* Robinett, 92 Va. 124, 22 S. E. 856; Morrison *v.* Householder, 79 Va. 627; Ashby *v.* Bell, 80 Va. 811; Cralle *v.* Cralle, 84 Va. 198, 201, 6 S. E. 12; Nickels *v.* Kane, 82 Va. 309; Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184; McCarty *v.* Chalfant, 14 W. Va. 531; Ward *v.* Ward, 21 W. Va. 262; Sandy *v.* Randall, 20 W. Va. 244; Stewart *v.* Stewart, 40 W. Va. 65, 20 S. E. 862; Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933; Thompson *v.* Catlett, 24 W. Va. 524, 540.

"This rule is as well established in Virginia as the rule that fiduciary accounts, regularly settled and confirmed by the court having jurisdiction, are to be treated as correct until shown by proper testimony to be incorrect." Robinett *v.* Robinett, 92 Va. 124, 22 S. E. 856.

An exception must be a distinct, positive objection in writing, an allegation of insufficiency or error, something to apprise the commissioner or court of the subject of the complaint, and to give the opposite party fair notice, of what the objection is. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1; Chapman *v.* Pittsburg, etc., R. Co., 18 W. Va. 184, 185; Crislip *v.* Cain, 19 W. Va. 438.

in dispute. Allegations of error without pointing out any particulars are clearly insufficient.[55]

In Bank *v.* Trigg, 106 Va. 527, 340, 56 S. E. 152, it is said, "Exceptions to the report of a master must state, article by article, the parts of the report which are intended to be excepted to; that the exceptions are in the nature of a special demurrer, and the party objecting must point out the error, otherwise the parts not excepted to will be taken as admitted."

In Perkins *v.* Saunders, 2 Hen. & M. 420, it is said, "I have considered it as a settled principle, that this court will not enter into an examination of accounts referred to a commissioner, and settled by him; unless an exception to them has been taken in the court of chancery, nor then, unless the exception be so stated as that this court may decide upon the equity, or legality, of the principle only, upon which the article is admitted, or rejected, without wasting their time in adjusting the particulars of a long and intricate account; a business which is the peculiar province of a commissioner and accountant; and which, if this court were to admit themselves to be bound to engage in, would in a year or two put a total stop to the administration of justice in civil causes in this commonwealth."

In McCarty *v.* Chalfant, 14 W. Va. 531, it is said, "The first exception filed by the defendants to the first statement of the accounts is too general in a case like this. That statement of the commissioner is evidently made up from a large number of items of account and evidence before him; and the exception in fact amounts to nothing more than the defendants endorsing upon the report: 'We, or I, object to this statement of accounts

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55. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1; Thomoson *v.* Catlett, 24 W. Va. 524, 540.

The following exception is sufficient: "The within report is excepted to because the commissioner allows * * * the claim of Luther H. McMillan, based on a note for $5,268.00 and purporting to be signed by Luther H. McMillan and Henry W. Reid, deceased." Reid *v.* Windsor, 111 Va. 825, 69 S. E. 1101.

In McCarty *v.* Chalfant, 14 W. Va. 531, the first exception was: "Because in the first statement of the accounts the commissioner reports John Chalfant indebted to McCarty, $78.99." The court held, that this exception would not require the court to examine the evidence to see whether the statement was justified by the evidence.

up to the 25th day of May, 1869.' This statement is manifestly made up from a number of items, vouchers, and evidence aliunde the statement itself, and to ascertain whether it is correct or not, the court below would have been required to have gone through all the items of account and evidence in the cause on the hunt of errors not pointed out. I do not understand the rule to require this of the court upon such vague and general exceptions in a case like this."

An exception to a report of commissioner, in general terms, that the commissioner has, under the proofs in the cause, found too small an amount in favor of the exceptor, and that the evidence taken in the cause shows him to be entitled to a much larger sum of money than that allowed by the commissioner, when a large amount of conflicting evidence has been taken thereon, is too general and indefinite to warrant the court in decreeing a greater and different sum to exceptant, entirely disregarding the report of the commissioner. Such report, if not satisfactory to the court, should have been recommitted for a restatement of the account, on such principles as in the court's view would correct the errors in the report.[56]

But an exception which points out the particulars in which the commissioner has failed to obey the order under which he is acting, or which shows wherein the account is settled on a wrong principle, is sufficiently specific.[57]

Where Evidence Conflicting.—Where a question of fact is referred, and the report is founded on conflicting evidence and is not excepted to on specified grounds, such report can not be impugned in the appellate court.[58]

West Virginia Code Provides.—In an exception it shall be sufficient to state the item or part of the report to which objection is made, but the court may, if good cause therefor appear, require the exception to be made more specific, or the grounds therefor to be stated therein, and may overrule such exception if the requisition be not complied with.[59]

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56. Poling *v.* Huffman, 48 W. Va. 639, 37 S. E. 526.
57. Robinett *v.* Robinett, 92 Va. 124, 22 S. E. 856.
58. Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.
59. W. Va. Code, § 4852.

§ 50. WAIVER OF EXCEPTIONS—*As to Notice to Parties.*—Objections to the notice for insufficiency will be waived if not taken in court below.[60]

As to Time of Filing Report.—An objection in an appellate tribunal that the report of a commissioner on which a decree is based was not retained in the commissioner's office ten days nor filed with the clerk of the court below thirty days before the case was heard, is not well taken, where the decree shows the case was heard on the report, and no exceptions were taken to the same on the hearing.[61] Where a party files exceptions to a commissioner's report within the ten days which the same is required by statute to be held by the commissioners before filing, and asks leave to file other exceptions during the term before the submission of the cause, and does so file such other exceptions, he must be held to have waived his right to except because the report was not held full ten days before filing.[62]

As to Fees of Commissioner.—Unless exceptions be made in the court below to the amount charged by the commissioner for his fees, which he duly makes oath to and which are allowed by that court, it is too late to make exceptions thereto in the appellate court.[63]

Exception by Codefendant.—One defendant files an exception to the commissioner's report; which is relied on by another defendant; but at the hearing in the court below, this exception is waived. The exception having been waived, the latter can not rely upon it in the appellate court.[64]

Withdrawal of Waiver.—An administrator having waived his exceptions to the commissioner's report, under the erroneous impression that the report would be sustained, and the case then finally disposed of, may withdraw his waiver, and renew his exceptions.[65]

THE END.

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60. Livesay *v.* Feamster, 21 W. Va. 83.

61. Ellison *v.* Peck, 2 W. Va. 487; Sandy *v.* Randall, 20 W. Va. 244.

62. Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Mann *v.* Peck, 45 W. Va. 18, 30 S. E. 206.

63. Shipman *v.* Fletcher, 83 Va. 349, 2 S. E. 198.

64. Robertson *v.* Trigg, 32 Gratt. 76.

65. Hannah *v.* Boyd, 25 Gratt. 692.